Supreme Court, U.S.
FILED

981083 NOV 20 1998

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WARREN LEE UNDERWOOD and DAVID OLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL BACON
906 North Street, Suite 100
Fresno, California 93721
(559) 241-7000

RONALD AULTMAN
Counsel of Record
LAW OFFICE OF
RONALD AULTMAN
ALEX R. TANDY
Suite 124, 8751 Highway 80 East
Fort Worth, Texas 76116
(817) 560-8300

Attorneys for Petitioners

60 pp

QUESTIONS PRESENTED FOR REVIEW

1. Was it error to fail to suppress evidence obtained from Petitioner's Texas residence pursuant to the execution of a search warrant due to the failure of the warrant to establish a nexus between the items sought and the Texas residence?

2. Was it error to allow the redaction of the Jencks Act discovery material that was turned over by the government to Petitioner?

3. Was it error to deny Petitioner's request to play at trial the entire tape recording of Romine's conversation with Jesse James?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT

I. THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT FOR UNDERWOOD'S TEXAS RESIDENCE FAILED TO ESTABLISH A NEXUS BETWEEN THE ITEMS SOUGHT AND THE RESIDENCE 12

II. THE REDACTION OF THE MATERIAL DISCOVERABLE PURSUANT TO THE JENCKS ACT CONSTITUTED PREJUDICIAL ERROR 18

TABLE OF CONTENTS (CONT'D)

Page

III. THE FAILURE TO ALLOW INTO EVIDENCE THE ENTIRE RECORDED CONVERSATION BETWEEN ROMINE AND JAMES CONSTITUTED PREJUDICIAL ERROR 21

CONCLUSION 24

APPENDIX A-

MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED JULY 31, 1998 ..... 1a

APPENDIX B-

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA AGAINST WARREN LEE UNDERWOOD, DATED JULY 29, 1997 AND FILED JULY 30, 1997..... 8a

APPENDIX C-

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA AGAINST DAVID OLSON DATED AND FILED JUNE 16, 1997.....17a

APPENDIX D-

PORTIONS OF TRIAL TRANSCRIPT CONTAINING RULINGS AND ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED MARCH 21, 1997..... 26a

APPENDIX E-

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING BY WARREN LEE UNDERWOOD DATED AND FILED AUGUST 21, 1998 .....33a

APPENDIX F-

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING BY DAVID OLSON DATED AND FILED SEPTEMBER 28, 1998.....34a

TABLE OF AUTHORITIES

Cases **Page**

Brady v. Maryland, 373 U.S. 83 (1963) 20

Brinegar v. United States, 338 U.S. 160 (1949) 14

Illinois v. Gates, 462 U.S. 213 (1983) 13, 14, 16

State v. Kahn, 555 N.W.2d 15 (Minn. Ct. App. 1996) 17

United States v. Alvarez, 86 F.3d 901 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 748 (1997) 18

United States v. Arias-Villanueva, 998 F.2d 1491 (9th Cir. 1993), *cert. denied*, 510 U.S. 937 (1994) ... 21

United States v. Bibbero, 749 F.2d 581 (9th Cir. 1984), *cert. denied*, 471 U.S. 1103 (1985) 18

United States v. Clark, 31 F.3d 831 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 920 (1995) 13

United States v. Flanagan, 423 F.2d 745 (5th Cir. 1970) 17

United States v. Freeman, 685 F.2d 942 (5th Cir. 1982) 14

United States v. Giacalone, 541 F.2d 508 (6th Cir. 1976) 14

United States v. Gomez, 625 F. Supp. 461 (E.D.N.Y. 1987) 15, 16

TABLE OF AUTHORITIES (CONT'D)

Cases **Page**

United States v. Gramlich, 551 F.2d 1359 (5th Cir. 1977), *cert. denied*, 434 U.S. 866 (1978) 12, 14, 16, 17

United States v. Green, 624 F.2d 222 (5th Cir. 1981) 17

United States v. Knowles, 594 F.2d 753 (9th Cir. 1979) 18

United States v. Leon, 468 U.S. 897 (1984) 14

United States v. Lockett, 674 F.2d 843 (11th Cir. 1982) 14, 17

United States v. Lucarz, 430 F.2d 1051 (9th Cir. 1970) 14

United States v. Meeks, 857 F.2d 1201 (8th Cir. 1988) 22

United States v. Pitts, 6 F.3d 1366 (9th Cir. 1993) ..... 12, 14, 15, 16 passim

United States v. Rios, 881 F. Supp. 772 (D. Conn. 1995) 16

United States v. Rosario, 918 F. Supp. 524 (D.R.I. 1996) 16

United States v. Ruiz, 822 F. Supp. 708 (D. Kan. 1993) 14, 16

TABLE OF AUTHORITIES (CONT'D)

Cases **Page**

United States v. Terry, 911 F.2d 272 (9th Cir. 1990) 15, 17

United States v. Thai, 29 F.3d 785 (2d Cir. 1994), *cert. denied*, 513 U.S. 977 (1995) 22

United States v. Tropp, 725 F. Supp. 482 (D. Wyo. 1989) 14

Zurcher v. Stanford Daily News, 436 U.S. 547 (1978) 14

Statutes

18 U.S.C. § 3231 5

18 U.S.C. § 3500 ..... 2, 18

18 U.S.C. § 922 5

21 U.S.C. § 841 5

21 U.S.C. § 846 5

21 U.S.C. § 853 5

28 U.S.C. § 1254 1

28 U.S.C. § 1291 5

Fed. R. Evid. 801 ..... 4, 21

U.S. Const. amend. IV 1, 12, 14, 17

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed on July 31, 1998, is unreported. It is reproduced in Appendix A at 1a. The Ninth Circuit's order denying Appellant Warren Lee Underwood's Petition for Rehearing, dated and filed on August 21, 1998, is unpublished. It is reproduced in Appendix E at 33a. The Ninth Circuit's Order denying Appellant David Olson's Petition for Rehearing, dated and filed on September 28, 1998, is unpublished. It is reproduced in Appendix F at 34a. The Judgments of the United States District Court for the Eastern District of California, against Warren Lee Underwood and David Olson, respectively, dated July 29, 1997 and June 16, 1997, are reproduced as Appendix B and C at 8 a and 17a, respectively. The trial court orally denied the motion to suppress; there is no written order.

The trial court's orders denying Petitioners' motions for disclosure of all Jencks Act materials and overruling the objection to the redaction of Jencks Act materials and the trial court's denials of Petitioners' requests to play the entire tape recording of the conversation between Romine and James are reproduced in Appendix D at 26a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was dated and filed on July 31, 1998. Its orders denying the Petitions for Rehearing were dated and filed on August 21, 1998 and September 28, 1998, respectively. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, support by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Jencks Act, 18 U.S.C. § 3500, provides as follows:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> (c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the

witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Fed. R. Evid. 801(d)(2)(E) provides as follows:

(d) Statements which are not hearsay. A statement is not hearsay if—

. . . .

(2) *Admission by party-opponent.* The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

This is a federal criminal case involving federal drug offenses over which the United States District Court for the Eastern District of California had subject-matter jurisdiction pursuant to 18 U.S.C. § 3231. The appeal to the United States Court of Appeals for the Ninth Circuit was from a final judgment of conviction and sentence of the United States District Court for the Eastern District of California. The Ninth Circuit therefore had jurisdiction pursuant to 28 U.S.C. § 1291.

The Petitioner, Warren Lee Underwood ("Underwood"), along with codefendant David Olson ("Olson"), was charged by indictment with various drug offenses. Underwood was charged with one count of conspiracy to possess with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count One), one count of attempt to possess methamphetamine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count Two), and one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) (Count Five). Underwood was also charged in two counts under the criminal forfeiture statute, 21 U.S.C. § 853 (Counts Three and Four). Underwood pleaded not guilty and, following a jury trial, was convicted on all counts. Underwood was sentenced by the district court to a mandatory term of life imprisonment pursuant to 21 U.S.C. § 841(b)(1)(A)(viii).

The charges against Underwood arose out of an undercover investigation conducted by federal authorities using a confidential informant, Jesse James, and a cooperating coconspirator, Ernest Romine. The charge of attempt to possess with intent to distribute methamphetamine was based on Underwood's alleged complicity in Romine's attempted purchase of the drugs from Jesse James on February 29, 1996. The conspiracy charge alleged that on or about October of 1993 through February of 1996, Underwood conspired with Romine

and David Olson to possess methamphetamine with intent to distribute. Underwood and Olson were tried together and both were convicted of the charges against them.

The government's case against Underwood was based primarily on the testimony of Romine. After Romine's arrest on February 29, 1996, he agreed to cooperate with the government in exchange for a lighter sentence. (T. Tr. at 453-54.) Romine implicated Underwood in Romine's attempted purchase of drugs from James, and testified that between October of 1993 through February of 1996 he made several purchases of various amounts of methamphetamine which he then sold to Underwood. (*Id.* at 458-70, 481-86, 559.) According to Romine's testimony, he would purchase drugs from various individuals in California and transport them or have them transported, sometimes by Olson, to Underwood at various motels in Texas, where Underwood lived. (*Id.* at 458-70, 472-83, 486.) On two occasions prior to February 1996, Underwood met Romine in California to purchase drugs and transport them back to Texas. (*Id.* at 484-85, 491-94.)

According to evidence presented by the government in regard to the attempted purchase of methamphetamine from James, Special Agent Donald McMillen of the Drug Enforcement Agency (DEA) instructed James in February of 1996 to set up a drug deal with Ernest Romine. (*Id.* at 123-25.) Acting on these instructions, James met with Romine on February 27, 1996, outside Carrows Restaurant in Bakersfield, California, to arrange a sale of 19 pounds of methamphetamine to Romine. (*Id.* at 125-26.)

James was "wired" during this meeting and the conversation was audiotaped. (*Id.*) At this meeting, Romine agreed to pay $75,000 for 10 pounds of methamphetamine and to pay later for the other 9 pounds. (*Id.* at 126, 503.) Federal agents conducting surveillance observed Romine arrive at Carrows Restaurant accompanied by Underwood. Underwood,

however, remained in the restaurant, while Romine met with James. (*Id.* at 127.)

Romine and James agreed to consummate the drug sale on February 29, 1996 at a Home Base parking lot near the Motel 6 in Bakersfield, near Highway 99 and Panama. (*Id.* at 128.) Underwood and Romine had previously checked into Room 211 at the Motel 6. (*Id.* at 185-86.) At about 12:55 p.m. on February 29, Romine met James at the Home Base parking lot. (*Id.* at 129.) Romine showed James $75,000, after which an undercover officer pulled up in a pickup truck with the drugs inside. After Romine took possession of the drugs, he was arrested.

Shortly thereafter, agents went to Room 211 of the Motel 6, an agent knocked on the door, and when Underwood opened the door, he was arrested. (*Id.* at 187, 188.) Underwood was then searched and various items found on him were seized, including about $3,000 in cash, some capsules containing methamphetamine, and a business card for Attorney Alex. R. Tandy. (*Id.* at 188-91.)

The agents then secured the room and sought a search warrant for the room. (*Id.* at 187, 205.) After obtaining the warrant a short time later that same day, the room was searched and various items were seized, including $23,500 in cash; a briefcase containing, among other things, a pill bottle with several capsules containing methamphetamine and a legal document—a petition by Underwood for writ of habeas corpus; and a smaller suitcase containing, among other things, a .38 Special revolver. (*Id.* at 194-205.) It was this gun that was the basis for defendant's conviction of being a felon in possession of a firearm.

On March 1, 1996, a search warrant was obtained for Underwood's residence in Glen Rose, Texas. (*Id.* at 215-16.) The warrant was executed the same day and various items were

seized, including various weapons, about $3,000 in cash, and paraphernalia. (*Id.* at 224-45.) No drugs were found, however. (*Id.*)

Prior to trial, the defendant filed motions to suppress the evidence seized pursuant to the execution of search warrants on February 29, 1996, from his motel room in California, and on March 1, 1996, from his residence in Texas. (Documents 39, 43, 52.) both motions were denied by the district court, and the evidence seized pursuant to these searches was admitted at trial. (T. Tr. at 194-205, 224-45.)

In regard to his attempted purchase of drugs from Jesse James, Romine testified that James contacted him in September of 1996 about James selling drugs to him. (*Id.* at 495.) Romine then contacted Underwood, whom he had not contacted in several months, about James's offer. (*Id.* at 494-96.) Underwood told Romine that he would be interested. (*Id.* at 497.) Romine was living in Texas at this time, and he and Underwood planned on going to California in Underwood's car hauler to pick up Romine's car, which had been wrecked, and possibly to look at some other cars. (*Id.* at 495-97, 500.) Underwood ran a legitimate car lot in Texas which involved picking up and selling cars and traveled a lot in connection with that business, including traveling to California. (*Id.* at 499, 669-70.) Underwood also dealt in antique cars. (*Id.* at 668.) Romine often helped Underwood transport cars in connection with Underwood's car business. (*Id.*)

Romine and Underwood left together for California on February 25, 1996 in Underwood's wrecker. (*Id.* at 498-500.) According to Romine, Underwood brought $100,000 with him. (*Id.* at 501.) The money was kept in Romine's clothes bag. (*Id.*) When they arrived in California two and one-half days later, Romine and Underwood checked into a room at the Holiday Inn in Palmdale, California. (*Id.*) Romine then contacted James by

telephone from the motel room to arrange the drug deal. (*Id.* at 502.)

When Romine met James at the restaurant in Bakersfield, Underwood went with him but stayed in the coffee shop during the meeting. (*Id.* at 502-03.) On their way back from the restaurant, Romine told Underwood about the deal, and they agreed they would wait in California to make the deal. (*Id.* at 504-05.)

From the restaurant, Romine and Underwood went to Romine's house in Rosamond, and Underwood bought two scooters, some motor parts, and a Camaro, and also a trailer on which to haul the Camaro back with him to Texas. (*Id.* at 505.) Romine and Underwood returned to the motel, learned it was booked, and then got a room at the Motel 6. (*Id.* at 506-07.)

Subsequently, Romine contacted James, and they agreed to meet to carry out the drug deal. (*Id.* at 507.) Romine took $75,000 with him to purchase the 10 pounds of methamphetamine and put the remaining $24,000 in his bag. (*Id.*) Underwood did not accompany Romine to this meeting because Romine did not want James to see Underwood. (*Id.* at 509.)

Underwood did not know Jesse James and never spoke to him. (*Id.* at 585.) Underwood presented no witnesses, but his defense was that he went to California with Romine in February of 1996 solely for purposes of his legitimate car lot business and that he knew nothing of the drug deal between Romine and James. Underwood further contended that he was not involved in an ongoing drug conspiracy with Romine but that Romine was involved with others in the drug business. Underwood contended that Romine lied at trial and implicated Underwood in order to receive a lighter sentence.

This defense was supported by statements made by Romine to James during their meeting on February 27, 1996 and to Agent McMillen on February 29, 1996 following Romine's arrest. During his meeting with James, Romine made several references to the "money man" for the deal, who Romine said was in Texas at the time and was named "Frank," an apparent reference to Frank Nunez. Underwood's name was never mentioned. At trial, Romine testified that he told James that he had gotten the money for the drugs from "a guy" who was in Texas because he did not want James to know Underwood was in California. (*Id.* at 511-12.)

In his tape-recorded statement to Agent McMillen made on February 29, 1996, Romine made several assertions that contradicted and impeached his trial testimony. Romine told McMillen that, prior to the deal in February 1996 involving James, he (Romine) had never been involved in any drug deals with Underwood and had never seen Underwood do any drug deals. (*Id.* at 569, 587.) Romine also told McMillen that he had never seen Underwood take any drugs and that the deal with James was the only time Romine had ever known Underwood to do anything such as that. (*Id.* at 570.) Romine testified at trial that he lied to Agent McMillen because he was nervous and had a headache. (*Id.* at 509.) On cross-examination, Romine also testified that he made 27 or 28 trips to purchase and deliver drugs in 1994 and 1995 and that these trips were for someone other than Underwood. (*Id.* at 524.)

Following his arrest, Romine had two interviews with Special Agent Donald McMillen. The first interview, on February 29, 1996, was tape-recorded. The second interview, which apparently lasted many hours, was not tape-recorded, but a report of the interview was turned over to the defendant. These interviews and other Jencks Act discovery materials that were turned over to the Petitioner pursuant to his motion for such materials were heavily redacted by the district court. In particular, the February 29 interview with Romine is very

heavily redacted. Whole pages of the transcript of the interview are simply blank, having been entirely redacted. The Petitioner's objections to the redaction of this material were overruled.

During trial, the court allowed the Petitioner to play a portion of the tape-recorded conversation between the government's chief witness and Jesse James, who was "wired" at the time and acting as an informant for the government. (*Id.* at 641.) The conversation took place on February 27, 1996 and involved Romine's attempted purchase of approximately 19 pounds of methamphetamine from James. The trial court denied Petitioner's motion to play the entire tape recording of the conversation but allowed only a portion of the tape to be played. (*Id.* at 543-58.)

Among the issues raised on appeal were (1) whether the district court erred in denying Underwood's motions for suppression of evidence, (2) whether the district court erred in redacting Jencks Act material, and (3) whether the district court erred in failing to admit the entire recorded conversation between Romine and James. The Ninth Circuit ruled against Underwood and Olson and affirmed their conviction.

REASONS FOR GRANTING THE WRIT

I. THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT FOR UNDERWOOD'S TEXAS RESIDENCE FAILED TO ESTABLISH A NEXUS BETWEEN THE ITEMS SOUGHT AND THE RESIDENCE.

This case presents the situation where a decision of the Ninth Circuit, *United States v. Pitts*, 6 F.3d 1366 (9th Cir. 1993), relied on by the Ninth Circuit in this case to uphold the search warrant at issue, is in conflict with a decision of the Fifth Circuit in *United States v. Gramlich*, 551 F.2d 1359 (5th Cir. 1977), *cert. denied*, 434 U.S. 866 (1978). This conflict implicates important Fourth Amendment concerns which should be addressed by this Court.

On March 1, 1996, one day after Underwood's arrest in California, a Texas search warrant was issued to search the Somervell County, Texas, residence of Underwood for "financial records, ledgers, and/or business writings relating to the distribution of controlled substances." The warrant was executed on March 1, 1996 and was based on the affidavit of Adam King, a Texas narcotics officer.

The affidavit alleges that Underwood ran a drug operation out of Texas involving various persons. Most of the concrete information provided, however, concerns the arrests of several of the other persons. For example, the affidavit states that Olson was arrested on November 18, 1994, Rice was arrested on February 9, 1995, and Milton was arrested on November 1, 1995. Underwood's residence in Texas has no connection to these arrests that occurred one to two years or more prior to the search in this case. Thus, the bulk of the

affidavit merely provides background information that utterly fails to link the Texas residence to criminal activity.

The only direct link to Underwood recited in the affidavit relates to his arrest in his motel room on February 29, 1996. This arrest occurred after the arrest of Romine on February 29, following his attempted purchase of methamphetamine from an informant and undercover officer. After his arrest, Romine told officers that the $75,000 he had to buy the drugs belonged to Underwood and that the drugs were going back to Underwood. Romine also told police that there was approximately $24,000 in the motel room and that Underwood was in the room. The police then went to the motel room, arrested Underwood, and secured the room until the search warrant arrived.

Although the foregoing facts may have established probable cause to arrest Underwood in California, they do not establish probable cause to search his residence in Texas for the items sought. The police had no information that drugs or contraband were in the residence. The Affiant's expert opinion that drugs and other evidence would be found in the residence is insufficient to establish probable cause.

A warrant may issue for the police to search a certain place and seize certain items only if supported by an affidavit showing probable cause, that is, facts and circumstances, within the Affiant's knowledge that would warrant a person of reasonable caution to believe that a specific offense has been committed and that property resulting from or evidencing the offense is located at the particular place to be searched. *Illinois v. Gates*, 462 U.S. 213 (1983); *United States v. Clark*, 31 F.3d 831 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 920 (1995). The existence of probable cause is determined upon sufficient and substantial facts, based upon a practical, common-sense consideration of the totality of the circumstances. *Illinois v. Gates*. An affidavit must present the magistrate with sufficient

information to allow him to determine probable cause; a mere conclusory statement will not do. *See United States v. Tropp*, 725 F. Supp. 482 (D. Wyo. 1989).

While the probable cause requirement of the Fourth Amendment does not require certainty before the search warrant may be issued, the courts have made it clear that something more than a mere suspicion is necessary. *Brinegar v. United States*, 338 U.S. 160 (1949); *United States v. Giacalone*, 541 F.2d 508 (6th Cir. 1976). Probable causes cannot be established by affidavits which are conclusory, provide little in the way of detail, or merely recite that the Affiant or some informant believes that probable cause exists. *United States v. Tropp*. The Fourth Amendment requires that the magistrate judge who issues a search warrant be provided with information from which he can make an independent evaluation of probable cause. *United States v. Ruiz*, 822 F. Supp. 708 (D. Kan. 1993). While it is recognized that a magistrate's determination of probable cause should be paid deference by reviewing courts, such deference "is not boundless." *United States v. Leon*, 468 U.S. 897, 914 (1984). The Supreme Court has consistently stressed that reviewing "courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." *Illinois v. Gates*, 462 U.S. at 239.

As noted, the Fourth Amendment requires that there be probable cause to believe that evidence of a crime will be found in the location the state wishes to search. *See Zurcher v. Stanford Daily News*, 436 U.S. 547 (1978). That is, a nexus must be established between the items sought and the place to be searched. *See United States v. Pitts*; *United States v. Lockett*, 674 F.2d 843 (11th Cir. 1982); *United States v. Gramlich*. Probable cause to believe that a person has committed a crime does not automatically provide probable cause to search his residence. *United States v. Pitts*; *United States v. Freeman*, 685 F.2d 942 (5th Cir. 1982); *United States*

v. Lucarz, 430 F.2d 1051 (9th Cir. 1970). No nexus was established in this case.

The Ninth Circuit relied upon *United States v. Pitts* to uphold the validity of the search warrant in this case against a challenge based, inter alia, on the warrant's failure to establish a nexus. In *United States v. Pitts*, the Ninth Circuit reiterated the rule followed in that circuit that in the case of drug dealers, evidence is likely to be found where the dealers live. 6 F.3d at 1369. In this case, the Ninth Circuit applied this rule without regard to the underlying facts and with no further discussion in holding that the search warrant established a reasonable nexus between the evidence sought and Underwood's Texas residence. Application of such a broad rule under the facts presented here demonstrates its fallacy and its unconstitutionality when strictly applied in all situations.

Moreover, the underpinnings of the rule conflict with decisions in other federal courts. *Pitts* cites *United States v. Terry*, 911 F.2d 272 (9th Cir. 1990), in support of the foregoing rule. In *Terry*, support for the rule is found in the principle that a magistrate may rely on the conclusions of experienced law enforcement officers regarding where evidence of a crime is likely to be found. *Id.* at 275.

The better principle, however, as stated by other federal courts, is that while the issuing magistrate is entitled to consider and credit the Affiant's specialized knowledge, it alone does not provide probable cause to search. *United States v. Gomez*, 625 F. Supp. 461 (E.D.N.Y. 1987). Indeed, as stated in *Gomez*, where, as here, there is nothing to connect the alleged illegal activities with the place to be searched, to issue a warrant based solely on the agents' expert opinion "would be to license virtually automatic searches of residences of persons arrested for narcotics offenses." *Id.* at 463. This would "effectively eviscerate the Fourth Amendment's requirement that there be probable cause to believe 'that contraband or evidence of a

crime will be found *in a particular place*.'" *Id.* (quoting *Illinois v. Gates*, 462 U.S. at 238 (*Gomez* court's emphasis); *United States v. Rios*, 881 F. Supp. 772, 777 (D. Conn. 1995) (the "better rule is the one applied in *Gomez*"); *United States v. Ruiz* (nexus not established by expert opinion of law enforcement officers); *United States v. Rosario*, 918 F. Supp. 524, 530-31 (D.R.I. 1996) (court discusses conflict in the circuits on the issue and rejects the Ninth Circuit rule, stating that to "permit a search warrant based solely upon the self-avowed expertise of a law-enforcement agent, without any other factual nexus to the subject property, would be an open invitation to vague warrants authorizing virtually automatic searches of any property used by a criminal suspect").

A situation similar to that at issue here was presented in *United States v. Gramlich*, and the decision in *Gramlich* is in conflict with the decision in *Pitts*. In *Gramlich*, the defendant was arrested while unloading marijuana from a Columbian freighter, and there was other evidence which indicated his substantial involvement in a smuggling operation. Nevertheless, the court held that such facts did not provide probable cause to search the defendant's residence, some 50 miles away, for marijuana, drug paraphernalia, and business records. The court stated as follows:

> In actuality, the affidavit related only one relevant circumstance upon which the magistrate could base his probable cause determination—the owner of the residence had been caught in the act of smuggling contraband at a place over fifty miles from his residence. This fact alone is insufficient to justify the inference that incriminating evidence existed at the residence. As Judge Godbold stated in the context of a burglary prosecution, "The statement [in an affidavit], even if reliable, that a named person who is a known felon has

> committed a burglary, plus possession by the suspect of some of the proceeds when arrested, does not without more authorize the issuance of a warrant to search the residence of the accused miles away." . . .
>
> We believe that *Flanagan* controls this case. We echo its conclusion: "It would be inappropriate for us, in this case, to attempt to spell out what might tip the scales. What we do decide is that what was here presented, accepted as reliable and as supported by sufficient circumstances, is not enough."

551 F.2d at 1362 (quoting *United States v. Flanagan*, 423 F.2d 745, 747 (5th Cir. 1970) (citations omitted)); *accord United States v. Lockett*; *see United States v. Green*, 634 F.2d 222 (5th Cir. 1981) (evidence of defendant's criminal activity in California was not sufficient to establish probable cause to search his Florida residence).

As *Gramlich* and the other cited authority demonstrates, the required nexus to Underwood's Texas residence was not established in this case. Underwood's activities and arrest in California do not establish probable cause to search his Texas residence for drugs and related evidence. It is respectfully submitted that the broad rule stated in *Pitts*, which was relied on by the Ninth Circuit in this case, is erroneous. The decision in *Pitts* is in conflict with the decision in *Gramlich* and under *Gramlich*, no nexus was established in this case. *See also State v. Kahn*, 555 N.W.2d 15, 18 (Minn. Ct. App. 1996) (Minnesota has not adopted the reasoning of *Pitts* and *Terry*). This case, in light of the facts presented, offers an excellent opportunity for this Court to address and settle this conflict. Therefore, especially in light of the important Fourth Amendment implications presented, it is respectfully submitted that the Court should grant the Petition in this case.

II. THE REDACTION OF THE MATERIAL DISCOVERABLE PURSUANT TO THE JENCKS ACT CONSTITUTED PREJUDICIAL ERROR.

Under the Jencks Act, 18 U.S.C. § 3500, the government must turn over pretrial statements made by the prosecution witnesses related to the subject matter of their trial testimony. *United States v. Alvarez*, 86 F.3d 901 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 748 (1997). "There are no exceptions to the Jencks rule that all statements relevant to the subject matter of the witness' testimony must be produced." *United States v. Alvarez*, 86 F.3d at 907 (quoting *United States v. Bibbero*, 749 F.2d 581, 585 (9th Cir. 1984), *cert. denied*, 471 U.S. 1103 (1985)). "The statement need relate only generally to the events and activities testified to by the witness to come within this sweep." *United States v. Alvarez*, 86 F.3d at 907. The district court's denial of discovery pursuant to the Jencks Act is reviewed for abuse of discretion. *Id.* at 901. Failure to disclose under the Jencks Act is subject to harmless error review. *United States v. Alvarez*. Thus, failure to comply with the Jencks Act does not per se require a new trial. *United States v. Knowles*, 594 F.2d 753 (9th Cir. 1979). However, such failure calls for close scrutiny. *Id.* The harmless error doctrine must be strictly applied in Jencks Act cases. *Id.*

The redacted Jencks Act materials primarily at issue here are interviews by the government with Romine following his arrest. Romine was the key government witness, an alleged coconspirator who cooperated with the government pursuant to a plea agreement in exchange for a lighter sentence. Petitioner, of course, does not know what was contained in the redacted material. A review of the unredacted material, however, suggests that the redacted material relates to other drug dealings by Romine with individuals whose identities are unknown to the defendant. Such information would be relevant and would have been very useful to Underwood's defense at

trial. Underwood's defense was that he was not involved in drugs with Romine but only accompanied him to California for legitimate purposes involving Underwood's car business. This position was supported by statements made by Romine to Special Agent McMillan during the February 29 interview and to Jesse James during their tape-recorded drug dealings on February 27, 1996, indicating that someone other than Underwood, a Frank Nunez, was Romine's money man and that his man was in Texas at the time. Underwood, of course, was in California at the time.

During McMillan's interview with Romine on February 29, 1996, Romine told McMillan that he had never sold drugs to Underwood in the past. (Tr. of Feb. 29, 1996 Interview at 1923.) This, of course, contradicts Romine's trial testimony. Romine told McMillan that he only contacted Underwood about the deal with Jesse James because he knew Underwood had money and could get rid of the drugs. (*Id.*) Romine told McMillan that he did not know anything about Underwood's business or any of his past drug dealings. (*Id.* at 1925-26.) Romine also stated that he never saw Underwood sell methamphetamine, although Underwood had told Ronnie that he had sold methamphetamine before. (*Id.* at 1926.)

During the interview, Romine also told McMillan that on February 27, 1996, when he told Jesse James, whom he refers to as "Cookie," about how "they made their money" on drugs by "breaking it down into quarter pounds and ounces," he was talking about someone other than Underwood. (*Id.* at 1940.) Following this statement, the next two pages of the transcript are redacted, and it resumes with Romine saying he once bought drugs from a Bobby Gonzales. (*Id.* at 1941-43.) This obviously suggests that the redacted portions pertain to other individuals with whom Romine was involved in the drug business.

Other redactions also occur after the conversation appears to turn to Romine's drug dealings with other individuals. (*See id.* at 1943-45, 1947-50, 1960-64.) Of particular significance is the redaction following Romine's mentioning of Mr. Nunez and his drug dealings with Nunez. (*Id.* at 1947-50.) Nunez is the person Romine indicates is the money man in his tape-recorded conversation with Jesse James.

All of this suggests that the redacted portions of the Jencks Act discovery material involve drug dealings conducted by Romine with individuals other than Underwood. If so, this material clearly falls within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963). Romine's trial testimony concerned his prior drug dealings over the course of several years, and he implicated Underwood in these dealings. Underwood's defense was that he was not involved in these prior drug dealings and that Romine was lying in order to curry favor with the government in order to receive a greatly reduced sentence. If Romine's prior statements described his prior drug dealings with other individuals, then clearly they related at least generally to the events and activities he testified to at trial, and thus they were discoverable under the Jencks Act.

Moreover, such material would have been highly relevant to Underwood's defense that, not he, but others, were involved with Romine's past drug dealings. Romine's prior statements could have been used to support this defense and to impeach Romine's trial testimony. In light of the fact that the government's case hinged almost entirely on Romine's testimony, the importance of such material cannot be overstated. Thus such material was also discoverable under *Brady*.

Circuit Judge Kleinfeld, dissenting from the majority opinion issued by the Ninth Circuit in this case, agreed with Petitioner that the redacted material was within the scope of the

Jencks Act and was relevant to Underwood's defense and, therefore, should have been produced by the government.

In light of the foregoing authority and dissenting opinion, it is respectfully submitted that this Court should take this opportunity to address the important issues raised in this case under the Jencks Act and, therefore, should grant this Petition.

III. THE FAILURE TO ALLOW INTO EVIDENCE THE ENTIRE RECORDED CONVERSATION BETWEEN ROMINE AND JAMES CONSTITUTED PREJUDICIAL ERROR.

An out-of-court statement by a coconspirator is admissible if (1) there is independent evidence of the existence of a conspiracy, (2) the statement was made in furtherance of the conspiracy, and (3) the statement was made during the course of the conspiracy. *United States v. Arias-Villanueva*, 998 F.2d 1491 (9th Cir. 1993), *cert. denied*, 510 U.S. 937 (1994); *see* Fed. R. Evid. 801(d)(2)(E). To be in furtherance of the conspiracy, the statement must further the common objectives of the conspiracy. *United States v. Arias-Villanueva*. The declarant's intent and not the actual effect is what is important. *Id.* While mere conversations or narrative declarations are not admissible under this rule, statements made to induce enlistment, further participation, prompt further action, allay fears, or keep coconspirators abreast of an ongoing conspiracy's activities are admissible. *Id.*

While statements that are merely "idle chatter" or that are "entirely retrospective" are not in furtherance of the conspiracy, statements relating past events meet the "in furtherance" test if they serve some current purpose in the

conspiracy, such as to promote cohesiveness or to provide reassurance to a coconspirator. *United States v. Thai*, 29 F.3d 785, 813 (2d Cir. 1994), *cert. denied*, 513 U.S. 977 (1995). Statements identifying other coconspirators or identifying a coconspirator's source for drugs have been deemed to be statements "in furtherance" of the conspiracy. *United States v. Meeks*, 857 F.2d 1201, 1203 (8th Cir. 1988).

The portions of the conversation between James and Romine that the district court did not allow into evidence clearly fell within the coconspirator exception to the hearsay rule and should have been admitted into evidence. The statements at issue met the foregoing test for admissibility. The district court apparently believed that the statements were not "in furtherance" of the conspiracy. Such finding is erroneous. While the statements may not have been directly related to attempted purchase of methamphetamine from James, they clearly meet the "in furtherance" test set forth above. The statements can be characterized as designed to keep coconspirators abreast of the ongoing conspiracy's activities or to promote cohesiveness or to provide reassurance to a coconspirator. Moreover, the statements appeared to identify or at least discuss other possible coconspirators. Accordingly, the statements were "in furtherance" of the conspiracy and therefore admissible. Furthermore, such statements were necessary to place the admitted portions of the conversation in context and to flesh out the references by Romine identifying the "money man" for the drug as someone other than Underwood.

Again, Circuit Judge Kleinfeld dissented from the Ninth Circuit's majority opinion on this issue. Judge Kleinfeld agreed with Petitioner and found that the excluded portions of the tape added credibility and salience to the theory that Nunez, not Underwood, was the buyer and that the excluded portions would have been of significant force for that purpose.

In light of the foregoing authority and dissenting opinion, it is respectfully submitted that this Court should grant this Petition in order to address the important issues raised here. Petitioner is serving a mandatory term of life imprisonment based on his conviction in this case. It is respectfully submitted that had the trial court allowed the disputed evidence at issue into evidence, Petitioner would not have been convicted. Accordingly, Petitioner respectfully requests that this Court grant this Petition in order to address the important issues presented.

CONCLUSION

For all the foregoing reasons, the Petitioners, Warren Lee Underwood and David Olson requests this Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

RONALD AULTMAN
Counsel of Record
LAW OFFICE OF
RONALD AULTMAN
ALEX R. TANDY
Suite 124, 8751 Highway 80 East
Fort Worth, Texas 76116
(817) 560-8300

DANIEL BACON
906 North Street, Suite 100
Fresno, California 93721
(559) 241-7000

Attorneys for Petitioners

APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED JULY 31, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-10291
D.C. No. CR-96-05059-REC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID OLSON,

Defendant-Appellant.

No. 97-10344
D.C. No. CR-96-05059-REC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WARREN LEE UNDERWOOD,

Defendant-Appellant.

MEMORANDUM*

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appendix A

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, Chief District Judge, Presiding

Argued and Submitted June 9, 1998
San Francisco, California

Before: WALLACE, T.G. NELSON, and KLEINFELD, Circuit Judges.

David Olson and Warren Lee Underwood appeal their convictions for drug offenses following jury trials. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

A. *The Search Warrants*

We accord significant deference to the magistrate making the original determination of probable cause and review such a finding for clear error. *United States v. Fulbright*, 105 F.3d 443, 453 (9th Cir.), *cert. denied*, 117 S. Ct. 1836 (1997). After reviewing the affidavits submitted in support of the search warrants challenged in this case, we hold there was no clear error in finding probable cause.

Regarding the Texas warrant, our precedent is clear that a magistrate may reasonably conclude that in the case of drug dealers, evidence is likely to be found where the dealers live. *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993) (citations omitted). Further, the information contained in the affidavit was not stale because the evidence sought was of an ongoing criminal business engaged in narcotics trafficking. *See United States v. Vaandering*, 50 F.3d 696, 700 (9th Cir. 1995); *Pitts*, 6 F.3d at 1369.

Regarding the California warrant, the affidavit provides a reasonable nexus between the motel room and the narcotics activity. Further, the mere fact that the list of items to be seized refers to categories of evidence does not render the search warrant overbroad. *United States v. Pollock*, 726 F.2d 1456, 1465-66 (9th Cir. 1984). Although we agree that the authorized seizure of "[p]apers, tickets, notes, schedules, receipts, and other items relating to travel" may be overbroad, the Government is correct that nothing was seized under this category of the warrant and therefore there is nothing to suppress. Finally, the catchall phrase at the end of the search warrant does not render the warrant invalid because it is not the only sentence describing the items to be seized. *See United States v. Clark*, 31 F.3d 831, 836 (9th Cir. 1994); *United States v. Perdomo*, 800 F.2d 916, 920 (9th Cir. 1986).

B. *The Jencks Act Materials*

We review the district court's denial of a discovery motion made pursuant to the Jencks Act for an abuse of discretion. *United States v. Nash*, 115 F.3d 1431, 1440 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1054 (1998). A new trial is required only if we conclude "that a producible statement existed and that substantial rights of appellant were affected by the failure to make that statement available for his use in cross-examination." *United States v. Oqbuehi*, 18 F.3d 807, 811 (9th Cir. 1994) (quotation and citation omitted). Having thoroughly reviewed *in camera* the redacted material submitted to us by the Government under seal, we are convinced that the district court did not abuse its discretion in deciding that the redacted material was not "producible" under the Jencks Act.

Appendix A

C. *The Redacted Tape Recording*

We review the district court's decision to exclude a portion of the tape-recorded statement between Jesse James and Ernest Romine on relevance grounds for an abuse of discretion. *United States v. Hicks*, 103 F.3d 837, 843 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1483 (1997). To be admissible as an out-of-court statement by a coconspirator, the recorded statement must be made "in furtherance of the conspiracy" to advance "the common objectives of the conspiracy." *United States v. Arias-Villanueva*, 998 F.2d 1491, 1502 (9th Cir. 1993). "[S]tatements made to induce enlistment, further participation, prompt further action, allay fears or keep coconspirators abreast of an ongoing conspiracy's activities are admissible." *Id.* However, mere conversations, narrative declarations, and idle chatter are not admissible. *Id.*

The district court did not abuse its discretion by excluding a portion of the tape-recorded conversation. The excluded portion discussed the lavish lifestyle of a man named "Frank," who James and Romine apparently believed spent a lot of money and led an active social life. This discussion, however, amounted to little more than idle chatter and did not further the conspiracy or its objectives. The district court's exclusion of this small portion of dialogue embedded in the middle of a much longer conversation was not an abuse of discretion.

D. *The Allen Charge*

The district court did not abuse its discretion in instructing the jury with an *Allen* charge. *United States v. Hernandez*, 105 F.3d 1330, 1333 (9th Cir.), *cert. denied*, 118 S. Ct. 227 (1997).[1]

---

1. Like the district court, we decline to consider the post-verdict statement made by juror Teresa Velasquez. *See* Federal Rule of Evidence 606(b).

The critical inquiry is whether "it is clear from the record that the charge had an impermissibly coercive effect on the jury." *Id.* The instruction delivered in this case substantially followed the Ninth Circuit's model instruction. However, the district court should not have instructed the jury three times that the case would be retried to another jury if this one failed to reach a verdict. We have noted that such comments have "no proper place before the jury" because "it is not true that the case will have to be retried; that is a matter of prosecutorial discretion." *United States v. Bonam*, 772 F.2d 1449, 1450 (9th Cir. 1985). Nevertheless, this case is like *Hernandez*, which held:

> The district court should not have mentioned the possibility of retrial in this case. However, this comment was made in the context of the district court's statement that no other set of jurors would be better equipped to decide the case than this jury. In this setting, the statement concerning retrial was not coercive.

Hernandez, 105 F.3d at 1334. Finally, the additional deliberation of sixty-six minutes following the instruction was not so short as to raise the specter of coercion. *Id.*

E. *Jury Misconduct*

Because none of the statements made after the verdict by juror Velasquez involve "extraneous prejudicial information" or "extraneous influences" on the jury, her statement is inadmissible to impeach the verdict. *See* Fed. R. Evid. 606(b); *Tanner v. United States*, 483 U.S. 107, 119 (1987); *McDowell v. Calderon*, 107 F.3d 1351, 1367 (9th Cir. 1997), *superseded in part on other grounds*, 130 F.3d 833 (9th Cir. 1997), *cert.*

denied, 118 S. Ct. 1575 (1998). The defendants are not entitled to an evidentiary hearing on this issue because the conclusion that the information allegedly misused by the jury is extraneous is a predicate for this circuit's requirement that a hearing be held "to determine the precise nature of the extraneous information." *United States v. Bagnariol*, 665 F.2d 877, 885 (9th Cir. 1981). Because none of the alleged instances of misconduct involved extraneous information, no hearing was required.

Jurors do not enter the jury room as blank slates. The fact that some jurors apparently expressed some of "the general knowledge, opinions, feelings and bias that every juror carries into the jury room" does not demonstrate jury misconduct. *McDowell*, 107 F.3d at 1367. One juror's alleged statement that the case could never have been tried in federal court unless the defendants were guilty does not amount to juror bias. *See United States v. Eubanks*, 591 F.2d 513, 516-17 (9th Cir. 1979).

AFFIRMED.

Appendix A

United States v. Olson and Underwood, 97-10291, 97-10344

KLEINFELD, Circuit Judge, dissenting:

I join in all parts of the majority disposition except parts B and C, as to which I respectfully dissent.

For the Jencks Act and the tape, it was relevant whether evidence showed that Nunez was the buyer, or Underwood. As to Underwood, evidence that Nunez was the buyer was exonerating. As to Olson, such evidence would tend to show that Romine was lying. While the relevance of the evidence as to Olson is more tenuous, its importance may have been considerable, because the jury nearly hung as to him.

The Jencks Act requires production of any statement which "relates to" the witness's testimony, whether it is exonerating or not. 18 U.S.C. § 3497(b). The redacted statements, in my opinion, relate to Romine's testimony.

In my opinion, the district judge was outside the bounds of his discretion in excluding a portion of the tape. It added credibility and salience to the theory that Nunez, not Underwood, was the buyer. The defendants' problem was not so much putting on some evidence of that proposition, as persuading the jury to listen to and believe it. The excluded portion of the tape would have been of significant force for that purpose.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA AGAINST WARREN LEE UNDERWOOD DATED JULY 29, 1997 AND FILED JULY 30, 1997

United States District Court
Eastern District of California

Case Number: 1:96CR05059-001

UNITED STATES OF AMERICA

v.

WARREN LEE UNDERWOOD

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

ALEX TANDY, JAMES HOMOLA
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) ONE, TWO & FIVE after a plea of not guilty.

Appendix B

Title & Section	**Nature of Offense**	**Date Offense Concluded**	**Count Number(s)**
21 U.S.C. 841(a)(1) & 846	Conspiracy to Possess with Intent to Distribute Controlled Substance	02/29/1996	one
21 U.S.C. 841(a)(1) & 846	Attempt to Possess Controlled Substance with Intent to Distribute	02/29/1996	two
18 U.S.C. 922(g)	Felon in Possession of Firearm	02/29/1996	Five

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Appendix B

Defendant's Soc. Sec. No.: 461-72-4258	07/28/1997 Date of Imposition of Judgment
Defendant's Date of Birth: 09/07/1946	s/ Robert E. Coyle Signature of Judicial Officer
Defendant's USM No.: 57245-097	ROBERT E. COYLE U.S. DISTRICT JUDGE Name and Title of Judicial Officer
Defendant's Residence Address: Fresno County Jail Fresno CA	7/29/97 Date
Defendant's Mailing Address: Fresno County Jail Fresno CA	

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of life as to counts One and Two to be served concurrently., (180) months as to count 5 to be served concurrently with counts One and Two.

☒ The court makes the following recommendations to the Bureau of Prisons:

> The Court recommends the defendant be incarcerated at an institution in TEXAS, but only in so far as this recommendation accords with security classification and space availability.

☒ The defendant is remanded to the custody of the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 120 month(s).

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally use or possess a controlled substance.

For offenses committed on or after September 13, 1994:

> The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

Appendix B

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below). See Special Conditions of Supervision - Page 4

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

Appendix B

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix B

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall provide the probation officer with access to any requested financial information.

2. The defendant shall not incur new debts or credit charges or open additional lines of credit charges or open additional lines of credit without the approval of the probation officer.

3. The defendant shall submit to the search of their person, property, home and vehicle by a U.S. Probation Officer, or any other authorized person under the immediate and personal supervision of the probation officer, without a search warrant. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to the condition.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment
Totals:	$ 150.00

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Appendix B

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ In full immediately; or

* * *

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

* * *

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

(SEE ATTACHED SHEET FOR LIST OF PROPERTY)

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

* * *

Appendix B

Guideline Range Determined by the Court:

* * *

☒ Fine waived or below the guideline range because of inability to pay.

* * *

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):
MANDATORY MINIMUM SENTENCE

* * *

☒ appeal rights given

* * *

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA AGAINST DAVID OLSON DATED AND FILED JUNE 16, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Case Number: *CR-F-96-5059-3-REC*

UNITED STATES OF AMERICA

VS

DAVID OLSON,

Defendant

DANIEL BACON
906 "N" STREET # 100
FRESNO, CA 93721

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

THE DEFENDANT:

* * *

[X] Was found guilty on Count(s) __ after a plea of not guilty.

Appendix C

Title & Section	**Nature of Offense**	**Date Offense Concluded**	**Count Number(s)**
21 U.S.C. 841(a)(1) & 846	Conspiracy to Possess with Intent to Distribute Controlled Substance	11/94	One

The defendant is sentenced as provided in pages 2 through 6 of this Judgment.

* * *

[X] Appeal rights given.
[ ] Bond is ordered exonerated; [X] upon surrender

* * *

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Appendix C

Defendant's Soc. Sec. Number: 451-60-8844

Defendant's Date of Birth: 12/23/1939

Defendant's USM No.: 29230-077

[ ] In Custody

Last known mailing address:
HCB 51, BOX 360
STEPHENVILLE,
TX 76401

JUNE 16, 1997
Date of Imposition of Sentence

s/ Robert E. Coyle
Signature of Judicial Officer

ROBERT E. COYLE
U.S. DISTRICT JUDGE
Name and Title of Judicial Officer

6/16/97
Date Signed

IMPRISONMENT

The defendant is hereby committed to the custody of the Bureau of Prisons of the United States to be imprisoned for a total term of (120) MONTHS.

[X] *The Court makes the following recommendations to the Bureau of Prisons:*

The defendant be incarcerated at an institution in BASTROP, TEXAS, but only in so far as this recommendation accords with security classification and space availability.

* * *

Appendix C

[X] *The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons, or to the US Marshal for this district, if no institution has been designated:*

[X] before 2:00 p.m. on AUGUST 11, 1997.

* * *

SUPERVISED RELEASE

Upon release from imprisonment the defendant shall be on supervised release for a term of (60) MONTHS.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

[X] The defendant shall not possess a firearm as defined in 13 USC 921. (Check, if applicable.)

For offenses committed on or after September 13, 1994:

[X] The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer. (Check, if applicable.)

Appendix C

* * *

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term(s) of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

Appendix C

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the

defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISION TERMS

1) Defendant shall submit to the search of his/her person, property, home and vehicle by a U.S. Probation Officer, or any other authorized person under the immediate and personal supervision of the probation officer, without a search warrant. Failure to submit to a search may be grounds for revocation. Defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

2) Defendant shall provide the probation officer with access to any requested financial information.

3) Defendant shall not incur new debts or credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties as set forth below:

ASSESSMENT

Amount: $50.00 Payable:
[X] in full, immediately

Appendix C

* * *

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. 3612(f). All of the payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. 3612(g).

* * *

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment.

All criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States Attorney.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

* * *

Guideline Range Determined by the court:

Total Offense Level: 16
Criminal History Category: ii
Imprisonment Range: 24 to 30 months
Supervised Release Range: 5 YEARS to LIFE
Fine Range: $5,000 to $4 MILLION

Appendix C

[X] Fine waived or below the guideline range because of inability to pay.

* * *

[X] The sentence departs from the guideline range:

[X] for the following specific reason(s):

MANDATORY MINIMUM

APPENDIX D — PORTIONS OF TRIAL TRANSCRIPT CONTAINING RULINGS AND ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED MARCH 21, 1997

[543] Fresno, California March 21, 1997
8:57 a.m.

(The following proceedings were held outside the presence of the jury:)

THE COURT: All right, the record reflects that we're in session without the presence of the jury. The Court wants to go over a couple of matters to where we are in this matter.

The Court on March 12th, issued its order relating to the — the transactions and the transcript, and on page 26, line 12 of the order, stated, "However, in the court's conclusion after reviewing the transcripts and police reports provided to the Court by the United States in camera, that contrary to the representations made by the defendant in opposition to this motion at oral argument, these transcripts and reports did not tend to exculpate either Underwood or Olson in this transaction and do not establish that Nunez was the money man in this transaction. It is clear to the Court that the discussion involved other transactions. Consequently, the Court concludes that evidence concerning dealings with Romine or Jesse James may have had with Nunez or other drug distributors is not probative, will tend to confuse the jury and involve collateral matters."

[544] No motion to reconsider that order was filed.

In opening statement, Mr. Tandy stated, and I have had a rough draft and reviewed the transcript and referring to the

wired — transcription, Ernest Romine will tell you that the money man is from Texas — or he is from Texas and Ernest Romine responded to this very question, without any hesitation with one word — with one word, he says "Frank." Nothing could be more clear than that. That is not what the transcript states.

Upon being — upon examining officer McMillen, he states — and on that tape, he was very specific about who the money man was. "Was that not true by naming Frank?

"Answer: No, sir.

"Question: And you do not recall that at any point that Mr. James asked the specific question as per your instructions about who is the money man? And that Mr. Romine said that very one five letter word, 'Frank.'

"No, sir, that did not occur."

So contrary to the Court's order, and once again, misrepresenting what's in the transcript, we continue on the subject. Whether the Court was right or wrong, there's still the misrepresentations were blatantly made.

This morning I received two new motions, one from the Government and one from Mr. Bacon. One, the Government's motion is a supplemental trial brief re [545] impeachment of Ernest Romine. It is not clear to me from that motion as to whether the Government now is taking the position that the other questions may be asked and that only the basis for the motion that is filed this morning on the irrelevant matters will be left out. In any event, the Court received it just before it got on the bench.

Appendix D

Mr. Bacon has filed a motion to allow defense to play tape-recorded meeting. I am assuming that that is a motion for reconsideration of the Court's prior ruling.

MR. BACON: Your Honor, in a sense, even considering the Court's prior ruling, I think there is — I want to make sure the record is clear. There was a motion for reconsideration filed shortly before the trial started. And I don't know — that's the one I never got an order for. It was tied in with the continuance motion. There was a written motion filed, but I presume that was denied.

THE COURT: Well, if you will recall, the Court didn't recall — when we discussed that before and before this trial started, I said it is denied.

MR. BACON: Okay. I'm not disputing that, Your Honor. This is being offered, however, Your Honor, as statements of a coconspirator made during the conspiracy and in furtherance of the conspiracy. And I don't think there's been a court order that this statement made by Jesse James cannot be heard by the jury. And that's why I wanted to . . . .

* * *

[608] have to search through it, I'll just stop it, because what they want to redact is at the end. I'll just stop it at that point and won't even play the rest until I get a redacted portion, Your Honor.

MS. SERVATIUS: If counsel would like, I think we have a tape player on the counter. If you want to advance the portion, do it on the counter and stop it and use the counter to advance to the next admissible portion.

MR. BACON: We could do that. Whatever is easy.

THE COURT: However you work it out. The Court's in recess.

MR. TANDY: Judge, we would like to renew — for defendant Underwood, we would like to ask for the redacted portion of the Jencks material also since he has now testified for the record purposes, and also we'd like to renew our objection about the entire transcript coming in. I know the Court's ruling, but I want to for the record's sake.

MR. BACON: And we join in that, the redacted Jencks material.

MS. SERVATIUS: Your Honor, the Jencks Act provides the statements of the witness while he's on direct have to be provided, that areas that counsel were permitted to go into generally — that the Court ruled upon shouldn't immediate need that issue to be readdressed.

[609] MR. BACON: I think I just need on the record, Your Honor, state that I think Jencks provides that anything that's relevant to the subject matter of his testimony, and I think those redacted portions would be relevant to the subject matter of his testimony and I would submit it.

THE COURT: The Court denies the request. I have not been furnished anything of the motion and nothing to refer anything at all to make me change my mind.

MR. BACON: Your Honor, the Court has all of the redacted Jencks material, though. Just for the record, I just want to make sure the Court has it.

THE COURT: All right, court's in recess.

(Recess.)

THE COURT: All right, the record will reflect that the jury is present and accounted for and that the parties are ready.

Miss Servatius, I understand you wish to call some witnesses out of order to get them on their way.

MS. SERVATIUS: Yes, Your Honor, thank you. The first one will be Joe Bates.

JIM BATES,

produced as a witness on behalf of the Government, having been first duly sworn, testified as follows:

THE CLERK: Take the witness stand right up here and give us your full name, please. . . .

* * *

[775] Defendant Underwood's Closing Argument

Another question, Ernest Romine, he's not in jail. Frank's not in jail. All these people that I heard about, Luis, Lupe, Rich, Bobbie, I didn't hear anything about them being in jail. Frank, I heard nothing about Frank being in jail, all these people that are out here doing these things.

Let's move on. Let's go to Waco. Waco, Texas.

Appendix D

THE COURT: Excuse me, Mr. Tandy. If you're going to change subjects, we'll take our lunch hour at this time. Ladies and gentlemen, we'll take our lunch recess at this time. We'll stand in recess until 1:30. Please remember my admonition to you not to speak about this case amongst yourselves or with anyone else until it's finally submitted to you. Have a nice lunch hour and we'll see you at 1:30. Thank you.

(The jury was excused.)

THE COURT: All right, the record will reflect we're in session without the presence of the jury. You may be seated.

I apologize. A couple of things. We got a little bit disjointed between last Friday and this morning. I don't know whether we put it on the record or not, the fact that the Court did deny your motions. I assume there's no misunderstanding about that, but I want to make sure it was on the record. Your Rule 29 motions were denied. The Court [776] on the venue or the location takes judicial notice of the fact that both Rosamond and Bakersfield and other areas that were mentioned are in the Eastern District of California.

And on the question of the multiple conspiracies, the Court's ruling is in line with its instructions that we discussed. So are there any questions about any of those? I'm sorry, we didn't.

MR. BACON: No.

THE COURT: And then the —

MR. HOMOLA: No, Your Honor.

Appendix D

THE COURT: The other thing that counsel advised the Court, they weren't going to call anybody. I didn't ask you specifically if you rested. I assumed that's what you intended when you said —

MR. TANDY: Yes.

MR. BACON: Yes.

THE COURT: All right, I just wanted the record to be straight. I can't remember if we were on the record or off the record. I just want to make sure those were on the record. Anything else we need —

MR. TANDY: Judge, this just happens to be my bag that I carry. Just happens to be black.

MR. HOMOLA: Don't say that in front of McMillen.

THE COURT: That's why I wanted to make sure it had nothing to do with the case, or you would probably lose . . . .

* * *

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING BY WARREN LEE UNDERWOOD DATED AND FILED AUGUST 21, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-10344
D.C. No. CR-96-05059-REC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WARREN LEE UNDERWOOD,

Defendant-Appellant.

ORDER

Before: WALLACE, T.G. NELSON, and KLEINFELD, Circuit Judges.

Appellant's petition for rehearing is DENIED.

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING BY DAVID OLSON DATED AND FILED SEPTEMBER 28, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-10291
D.C. No. CR-96-05059-REC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID OLSON,

Defendant-Appellant.

ORDER

Before: WALLACE, T.G. NELSON, and KLEINFELD, Circuit Judges.

Judge Wallace and Judge T.G. Nelson have voted to deny appellant's petition for rehearing. Judge Kleinfeld has voted to grant the petition for rehearing. The panel has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appendix F

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.